

LATHAM & WATKINS LLP

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VIA EMAIL

Clerk of the Board
Air Resources Board
1001 I Street
Sacramento, CA 95814

355 South Grand Avenue
Los Angeles, California 90071-1560
Tel: +1.213.485.1234 Fax: +1.213.891.8763
www.lw.com

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File No. 043053-0000

**Re: California Climate Coalition Comments
regarding Proposed California Cap on Greenhouse Gas Emissions and
Market-Based Compliance Mechanisms Regulation, Including Compliance
Offset Protocols; 15-Day Notice**

Dear Chair Nichols and Members of the Board:

The California Climate Coalition is a coalition of California industries and cleantech companies who have joined together to develop recommendations for California's AB32 program. Since the fall of 2006, the Coalition has provided input to the ARB staff regarding design approaches that can accelerate low-carbon technology deployment in California and reduce greenhouse gas emissions in a cost-effective manner.

We applaud the decision to phase in the AB32 cap and trade program, including the auction and compliance obligations. We believe that the additional process and timing will materially aid covered entities and other market participants and help to identify and avoid potential market and compliance problems. We hope that the additional time will enable the Board and staff to consider more fully some of the California Climate Coalition recommendations.

We have divided our comments into two sections. The first addresses recommendations for program enhancements that could be critical to the success of the AB32 program. We urge the Board to consider implementing these additional provisions. The second set of comments relate to specific provisions of the proposed regulations.

I. Recommended Program Enhancements

To ensure prompt and effective cleantech investment, to avoid unintended compliance difficulties or inequities, to resolve uncertainties regarding potentially overlapping California agency jurisdiction, and for other important considerations, the California Climate Coalition

strongly recommends that the Board implement the following additional provisions not currently contained in the proposed regulatory package.

A. Periodic Program Tracking and Evaluation

We remain concerned that the market, as currently proposed, remains highly dependent on unpredictable future contingencies, including the degree of linkage to other jurisdictions (if any), the actual availability of verifiable offsets, the extent to which consumer demand will respond as predicted to carbon and energy prices and the degree of emissions performance of the AB32 complementary measures. The staff have recognized that such contingencies ultimately will have a very material impact on California carbon prices. The Board should establish a periodic monitoring and reporting process by which such key elements can be carefully tracked and reported so that the Board can consider and, as appropriate, implement any necessary program adjustments.

We strongly recommend that the Board require the staff, consulting with other appropriate state agencies, departments and commissions, to prepare an annual (or more frequent) report assessing the following items:

- (1) allowance, auction and offset supply and price (including offset project characterizations by sector, jurisdiction, verifying entities and other relevant information);
- (2) consumer demand response to energy prices and other signals;
- (3) greenhouse gas emissions performance of the AB32 complementary measures (including at a minimum the low carbon fuel standard, the motor vehicle program, the renewable electricity standard and the sustainable communities program) relative to projected performance;
- (4) electricity prices;
- (5) transportation fuel prices;
- (6) employment levels and trends for all regulated sectors;
- (7) permitting activity for all regulated sectors;
- (8) leakage determinations; and
- (9) such other factors as the Board may designate regarding AB32 program performance.

Depending upon the findings of such annual (or other periodic) reports, the Board should be prepared to implement appropriate cost-containment mechanisms, circuit-breakers or other program protections.

B. Independent Dispute Resolution Mechanism

We strongly recommend that the Board direct staff to develop regulations for the operation of an independent administrative dispute resolution body. The sole purpose of this entity would be to adjudicate efficiently and fairly those factual, legal and jurisdictional disputes that inevitably will arise in the implementation of the AB32 program. The absence of such an expert administrative dispute resolution body will not prevent controversy from arising. Indeed, in the absence of such an entity, aggrieved parties will simply take their disputes to courts of law. We strongly believe that an independent dispute resolution entity nested within the ARB can provide a fair and efficient means of adjudicating most disputes, thus assuring the smooth operation of the program and minimizing time delays, uncertainties and compliance costs.

While there are a variety of disputes that could arise under the program, as an illustration, among the first will be disputes regarding actual emissions from covered entities (including staff decisions regarding "assigned emissions"). These may arise as the ARB staff attempts to apply different emission factors or missing data assumptions to covered entity operations. Another area of potential dispute may be whether offsets have properly been verified and, if so, what level of emission reductions they represent. There are innumerable situations under such a comprehensive regulatory program in which such factual, legal and jurisdiction disputes will arise.

C. Rapid Cleantech Deployment

Consistent with prior CCC recommendations (see www.caclimate.org), the Board should establish an Executive Office-level position with the primary responsibility of ensuring that the very cleantech and facility investments anticipated by the AB32 program and its complementary measures (e.g., the low carbon fuel standard, the renewable electricity standard and motor vehicle technologies, among other measures) are expedited by the ARB and its sister departments, commissions, agencies and air districts. This responsibility should include appropriate reform of CEQA and air quality regulations so that low carbon fuels and technologies rapidly receive required product or facility performance verifications, certifications and permits. The responsible ARB Executive should submit periodic reports to the Board regarding obstacles, proposed solutions and degree of success.

D. Equivalency of California's AB32 Program with EPA's PSD and NSPS Programs

We applaud California's significant efforts to assure that its AB32 program will be recognized by the US EPA as fully equivalent to EPA's emerging NSPS program for greenhouse gas emissions from electricity generating units and petroleum refineries and thus avoid subjecting California facilities to costly duplicative and overlapping regulation. We will continue to support such equivalency recommendations. We believe, however, that California should go further to recommend that US EPA *integrate* its new source review program for greenhouse gas-emitting sources into the NSPS program so that greenhouse gas-reducing facility modifications or new facility cleantech investments are not made more costly nor unduly

delayed.¹ A single, integrated program under AB32 for California sources will be critical to assuring that California can meet its AB32 goals expeditiously.

II. Specific Comments regarding Proposed Regulatory Provisions

A. Transition and Equity Issues

While the 15-day language contains much more information than previous drafts regarding program allowance allocations and other critical program elements, it does not fully protect covered entities against potential equity, leakage or other material concerns. We note, for example, that for some sources the staff have proposed a benchmarking methodology that will result in allocating at program commencement only approximately one half (!) of the allowances they will need to comply. Starting facilities significantly “in the hole” will create very significant leakage pressure and punish companies that have made material investments in California, among other reasons, to assure that their products meet highly-stringent California environmental standards. There is simply no basis for the program to provide some sources with full economic protection at the outset of the program yet to punish others.

We urge the Board and staff to correct the existing disparities and inequities among sources, particularly those that would exist at the outset of the program, so as to assure maximum fairness, to minimize the redistribution of wealth that inevitably will result from such disparities and to protect against leakage that could occur in the absence of such corrections.

B. Fair and Consistent Application of Auction Revenues

The Board should embrace the following principles for applying auction revenues.
Auction revenues:

- i) from any sector should be applied primarily to greenhouse gas emission reductions from within that sector;
- ii) from all sectors should be used for comparable purposes; and
- iii) to the extent consumer rebates are offered, similar rebates should be available to consumers of fuels and other consumer products as well as electricity.

¹ Under such an integrated approach, covered entities subject to the AB32 cap and trade program would be deemed to comply with any otherwise-applicable PSD requirement for greenhouse gas emissions purposes (e.g., Best Available Control Technology (BACT)) by virtue of its compliance with the AB32 cap and trade program. Such compliance is demonstrated by adherence to the declining carbon cap, which provides an ongoing incentive for facilities to implement cost-effective greenhouse gas-reducing technologies and consider energy efficiency opportunities.

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C. Enforcement

As we have noted previously, we do not believe that it would be appropriate for covered entities to be subject to duplicative or overlapping penalties. The program's market-oriented penalty structure (e.g., the 4:1 allowance or offset relinquishment under applicable circumstances) should suffice to ensure effective program operation. As drafted, the program still creates overlapping jeopardy, however, for covered entities by subjecting them potentially to a number of daily, or per-compliance-instrument (i.e., per ton), penalties. The language also does not sufficiently protect covered entities that are working in good faith with qualified verifiers. We appreciate that the staff has considered selective use of language that could limit more serious penalties to the more significant scenarios in which fraud or other bad intent is present. But this language does not yet displace other penalties. We believe that such differentiation among penalty types is very important so as not unduly to punish good actors. We suggest that the staff continue to work with interested stakeholders to identify different penalty scenarios and to insert clarifying language into the relevant sections to ensure that covered entities are not subject to overlapping penalties.

We look forward to working further with the ARB staff to ensure that the AB32 program becomes a success, that it operates fairly and efficiently and that it serves as a model for other jurisdictions. We hope that its implementation will create the confidence necessary to reduce the existing regulatory and other barriers to energy investments in the state.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert A. Wyman".

Robert A. Wyman
of LATHAM & WATKINS LLP